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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1969

No. 1060

FISHEL PRODUCTS CO., a copartnership consisting of EDWARD R. FISHEL and JOHN D. FISHEL,

Appellants,

vs.

COMMODITY CREDIT CORPORATION, AGRICULTURAL STABILIZATION AND CONSERVATION SERVICE and UNITED STATES OF AMERICA,

Appellees.

PETITION FOR A WRIT OF CERTIORARI to the United States Court of Appeals for the Ninth Circuit

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PERNAU-WALSH PRINTING CO., SAN FRANCISCO

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PETITION FOR A WRIT OF CERTIORARI
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for the Ninth Circuit

To the Honorable Warren E. Burger, Chief Justice, and to the Honorable Associate Justices of the Supreme Court of the United States:

Appellant Fishel Products Co., a copartnership, Appellant below, respectfully petitions that a Writ of

Certiorari issue to the United Court of Appeals for the Ninth Circuit to review the decision of that Court entered on September 15, 1969, affirming Summary Judgment of the United States District Court.

OPINIONS BELOW

The opinion of the Court of Appeals is appended hereto as Appendix A. The opinion of the United States District Court For The Northern District Of California is unreported and is appended hereto as Appendix B.

JURISDICTION

On September 15, 1969 the United States Court of Appeals For The Ninth Circuit affirmed the order of the United States District Court For The Northern District of California granting a summary judgment in the sum of $159,967.07 in favor of Appellee Commodity Credit Corporation and against Petitioner. The jurisdiction of the Court is invoked under Title 28, United States Code, Section 1254 (1).

QUESTION PRESENTED

Whether Petitioner has been deprived of Due Process of Law by the conduct of the Contracts Disputes board in allowing Commodity Credit Corpora-

tion to assert for the first time a counterclaim for $159,967.07 in the middle of a four day hearing for the sake of administration expediency over the timely objection of Petitioner. The decision of the Board to allow consideration of the counterclaim under these circumstances, precluded Petitioner from preparing for and presenting evidence in opposition to the counterclaim at an open hearing in accordance with basic rules of Due Process. A further issue is whether the *Wunderlich Act,* Title 41 United States Code 322 precludes the District Court from receiving evidence on the issues raised by the counterclaim under the particular circumstances of this case, and whether the conduct of the Board was arbitrary and capricious so as to imply bad faith.

STATUTE INVOLVED

This case involves interpretation of the *Wunderlich Act,* 41 U.S.C. 321-322.

STATEMENT OF THE CASE

This Petition is based upon the grounds that a hearing is necessary to secure uniformity of decision and the settlement of important questions of law. Petitioner seeks an examination of the record for error on the grounds: (1) The Opinion of the United States Court of Appeals affirms the action of the Contract Disputes Board in allowing Commodity Credit Corporation ("CCC") to assert a counterclaim

for $159,967.07 on the third day of a hearing, depriving Petitioner of an opportunity to initiate discovery or otherwise prepare to resist the counterclaim. Petitioner was deprived of elementary rights and due process of law for the sake of administrative convenience and expediency. (2) The issue of whether the Courts are bound by decisions of the Contract Disputes Board on questions of law under 41 U.S.C. 322 is a question of first impression. (3) The Opinion of the Court of Appeals contains an inherent contradiction, in that the Court holds Appellant was not deprived of a full and fair opportunity to present its case, while acknowledging that so large a counterclaim as $159,967.07 was entertained by the Disputes Board over Fishel's objection after the Board initially refused to admit the claim into evidence. (4) The Court of Appeals did not decide the issue of whether the Board had jurisdiction to decide a dispute under a terminated contract. (5) There is a conflict between the Circuits as represented by *United States v. Hamden Co-Operative Creamery Co.* (2nd Cir. 1961), 297 Fed. 2d 130, in contrast to *United States v. Duggan,* 210 Fed. 2d 926, Eighth Circuit. (6) The principal issue involved is whether the rights of a small businessman involved in a dispute with a corporation of the United States are to be sacrificed and financial ruin brought upon him by the Contract Disputes Board entertaining so large a counterclaim without according Petitioner due process of reasonable notice that the claim was being presented and an opportunity to call witnesses and present evidence at an open hearing.

REASONS FOR GRANTING THE WRIT

The Court has demonstrated its concern for individual rights in recent landmark decisions in the fields of criminal law and civil rights. To a small businessman the rendition of an adverse decision by the Contract Disputes Board in the sum of $159,967.07 raised at the last minute by CCC without an opportunity for Petitioner to prepare or to present evidence at an open hearing can be just as devastating as the incarceration of a person who has not been afforded elementary and basic rights. The Court has repeatedly held that the right of an individual to a fair trial will not be sacrificed because it is more expedient to employ other means. The same basic rules of due process should apply no less in civil cases. A review of the record leads to the compelling conclusion that the Contract Disputes Board has not afforded Appellant rudimentary due process. The Court of Appeals has declined to review the decisions of the Board on issues of law which is mandated by Title 41 United States Code 322. The decision of the Board to allow the filing of a large counterclaim on the third day of the hearing should not be sanctioned by a Summary Judgment, thereby depriving Appellant both before the Disputes Board and in the District Court of an opportunity to prevent evidence in opposition to a large counterclaim at a trial or open hearing that the wheat could have been reconditioned at a nominal charge. Petitioner has substantial evidence that CCC failed to mitigate damages but never was heard on this issue either before the Disputes Board or in the District Court.

STATEMENT OF THE FACTS

Suit has been filed by Fishel Products Company, a small food processing firm in Kingsburg, California, against Commodity Credit Corporation to recover $26,630.50, the contract price for various shipments of bulgur which was processed by Fishel Products Company at its plant in Kingsburg, accepted by Commodity Credit Corporation, and shipped to Saigon, Viet Nam. Petitioner's First Amended Complaint also seeks damages for wrongful termination of contract. The first and second causes of action are based on the premise that a direct right of action exists for breach of contract since the contract was terminated in mid-term. Petitioner asserts the Wunderlich Act (41 U.S.C. 321-322) is not controlling because the subject matter was not a "dispute arising under this contract", under Article 39 of the Contract providing that "any dispute concerning a question of fact arising under this contract" shall be decided by the Contracting Officer or Designee of the Agency.

The third cause of action asserts that the decision of the Contract Disputes Board is not binding because Petitioner has new evidence which was not presented at the hearing before the Board with respect to the grossly excessive counterclaim for wheat which was sold at private sale when it could have been salvaged and cleaned at nominal cost on the basis that the Commodity Credit Corporation failed to properly mitigate damages.

The third and fourth causes of action allege that the wheat could have been reconditioned for a nomi-

nal charge and instead of reconditioning it, Commodity Credit Corporation sold the wheat and tried to use the price received at a private sale as a measure of its damages.

The fifth cause of action sets forth that the counterclaim of $159,967.07 was presented for the first time on the second day of a four-day hearing before the Contract Disputes Board. Petitioner objected to the presentation of the claim at the hearing of the Board, and it was prevented from preparing for and submitting evidence on the counter-claim, and the issues raised thereby were to be separated and reserved for a later decision which was subsequently rendered by the Board without an opportunity on the part of Petitioner to submit evidence on the counterclaim at an open hearing.

The decision of the Contract Disputes Board, using private sales of the wheat as the measure of damages rather than the nominal cost to reclean and salvage the wheat was so erroneous as to imply bad faith.

The decision of the Contract Disputes Board was arbitrary in that the counter-claim for $159,967.07 was presented for the first time on the second day of a four-day hearing before the Contract Disputes Board, Petitioner had not been previously advised of such counter-claim and the Board did not allow Appellant an adequate opportunity to prepare for the issues raised by the counter-claim. Such action by the Board was arbitrary and capricious and implied bad faith.

Petitioner was not allowed the right to answer and litigate the counter-claim presented by defendant, and was assured by the Contract Disputes Board it would have an opportunity to answer and litigate these claims, and the denial of this opportunity was so arbitrary and capricious as to imply bad faith.

Defendant, Commodity Credit Corporation, moved the Court for Summary Judgment under Rule 56 on the ground that the decision of the Board was supported by substantial evidence and is *final and conclusive* on the rights of the parties. The District Court granted Summary Judgment in favor of defendant on the sole basis that the decision was not procured by fraud.

Page 19 of the Decision of the Contract Disputes Board states:

> "Attorney for CCC at the end of his opening statement sought to serve on the Petitioner the Contracting Officer's findings of fact and a determination of the amount of damages claimed by CCC against Petitioner resulting from failure of performance under the contracts. A copy of the findings and the determination together with supporting documents was offered in evidence to support the Contracting Officer's computation of the CCC claim. Petitioner's attorney objected to this procedure on the grounds that it was too late for Petitioner to meet the claim for these damages at this hearing. After hearing both attorneys on the question, the Board refused to admit the damage claim into evidence at that time and held in abeyance its ruling as to whether it would be accepted in evidence at the

hearing. (Tr. p. 20). Later on the third day of the hearing, the Presiding Officer ruled that in the interest of disposing of this entire matter as promptly as possible CCC's claim would be admitted into the record. . . ."

The Declaration of John D. Fishel sets forth that Balfour-Guthrie Company subsequently negotiated for resale the salvaged grain after cleaning. The Declaration shows that the grain was reconditioned at a nominal charge and the measure of damages, if any as a matter of law, should have been the reconditioning costs. The Declaration of John D. Fishel states that the counter-claim was not presented until the second day of a four-day hearing, which is supported by the record of the Contract Disputes Board. The Declaration states, and the Board's own findings indicate that the Petitioner was not permitted to prepare for its defense on the counter-claim, and that the Fishel Products Company had been assured by the Contract Disputes Board that there would be an opportunity to litigate the very substantial issues raised by the $159,967.07 counter-claim.

ISSUES

1. Is the Wunderlich Act, requiring an administrative determination under the "disputes" clause of the Contract, applicable to a contract which is terminated for alleged default shortly after its inception.

2. Does finality attach to decisions of law made by the Contract Disputes Board.

3. Did the Disputes Board act capriciously and arbitrarily so as to imply bad faith in entertaining a $159,967.07 claim for the first time after the commencement of the hearing and in failing to give Appellant an opportunity to prepare for and present evidence on said issue at an open hearing?

4. Whether Petitioner was deprived of due process by the conduct of the Board.

ARGUMENT

THE WUNDERLICH ACT, REQUIRING AN ADMINISTRATIVE DETERMINATION UNDER THE "DISPUTES" CLAUSE OF THE CONTRACT IS NOT APPLICABLE TO A CONTRACT WHICH IS TERMINATED FOR ALLEGED DEFAULT SHORTLY AFTER ITS INCEPTION.

Plaintiff Fishel Products Company filed this action for damages based on a *terminated* contract. This case does not stem from a dispute under a performed contract but one which was terminated by Commodity Credit Corporation for alleged default shortly after its inception and prior to completion. Article 39 of the Standard Specifications of the contract provides:

> "Except as may otherwise be provided in the contract, any dispute concerning a question of fact arising under this contract which is not disposed of by agreement shall be decided by the contracting officer, or designee of agency. . . ."

The distinction is recognized between a dispute "arising under this contract" and a cause of action for damages on a terminated contract. In *Compudyne*

Corporation v. Maxon Construction Co., 248 Fed. Supp. 83, the Court stated, at page 85:

> "Once the contract has been terminated as occurred here, it no longer exists and there can be no 'factual dispute' under it.
>
> ". . . In addition, there is no hint whatsoever from the remainder of the disputes clause that it encompasses factual issues that exist after the contract ceases to exist.
>
> "Secondly, the purpose of the disputes clause is to expedite performance of the contract and to avoid initial resort to the Courts with the resultant delay, expense and likely aggravation of damages. Determination of factual disputes by the Contracting Officer can often lead to a quick and satisfactory resolution of issues and completion of the contract with minimum of lost time and money.
>
> "However, once the contract has been terminated pursuant to its termination clause, the duties of the parties to perform have come to an end. No longer is there any need for a quick resolution of issues since one party, relying on a contractual provision, has discharged the other of any responsibility. While the discharging party may still be liable in damages for breach of contract, the position of the parties is fixed, and the terminating party is free to find someone else to complete the contract. A dispute clause is designed to expedite the completion of a contract, but once the parties have come to the point where one has terminated the contract, no useful purpose exists to hold things in abeyance since a decision of the Contracting Officer in favor of the nonterminating party does not re-

> institute the contract under any of its provisions that this court has read. Consequently, where the contract has been terminated, the rationale of the dispute clause ceases to exist."

Similarly, in *E. I. Du Pont de Nemours & Co. v. Lyles & Lang Construction Co.,* 219 Fed. 2d 328, the Court stated, at page 333:

> "We think it clear that the trial Judge correctly refused to hold the action barred for failure to proceed under the clause or to limit the issues in the case by excluding all issues of fact. In the first place, we do not think that the disputes clause has any application to a case such as this. . . ."
>
> ". . . The disputes clause was evidently intended to furnish a ready means of administrative settlement of questions arising during the performance of the contract which might delay or interfere with performance, not to provide for unilateral determination of the amount due under the contract upon its termination."

In *United States v. Duggan,* 210 Fed. 2d 926, Eighth Circuit, March, 1954, a contract between the Government and a contractor was terminated by default of the contractor. The United States asserted a claim of $1,700,000.00 against the contractor. The defendant asserted that as a condition precedent to the filing of suit for damages, the United States was required to comply with the terms of the "Disputes" clause of the contract for the administrative determination of claims.

In holding that on a terminated contract the District Court had jurisdiction to entertain the claim, the Court stated, at page 932:

> "We do not find in the contract any agreement between the parties for the administrative determination of the claims of the Government against the Contractor upon the termination of the contract. Even if there has been in the contract no express reservation of claims in favor of the Government against the Contractor, we think the Contractor would not be relieved from liability to the Government for any loss proximately resulting from the failure of the Contractor to perform its obligations under the contract or its legal obligation to reimburse the Government for monies received by the Contractor to which it was not entitled.
>
> "The District Court's conclusion that it was without jurisdiction to entertain the claim of the Government in advance of an administrative determination of the amount justly due upon the termination of the contract, we think is not logically tenable. . . . The Government was, in our opinion, entitled to have its claim against the Contractor judicially determined."

And further:

> ". . . Obviously, we think this Article provided for nothing more than an administrative determination of questions of fact which might arise during the course of the performance of the contract and prior to its termination."

The Court held that matters of this complexity should not be determined on summary judgment, stating, at page 933:

"This was not the kind of a controversy which properly could be terminated by dismissing the Government's claim. Complicated and doubtful issues of fact and law can seldom be satisfactorily determined by dismissing a pleading for insufficiency of statement.

". . . The issues raised by the Government's claim and the objection of the trustee should have been determined after a trial and after affording each of the parties a full opportunity to introduce any and all evidence which has any bearing on those issues."

To the same effect is *United States v. Heaton,* 195 Fed. Supp. 742, where the Court stated, in denying summary judgment under similar facts, at page 745:

"For the reason that the disputes clause applies neither to controversies arising after the termination of the contract nor to actions for breach of contract the Court holds that the findings of fact made pursuant to the disputes clause are not final and binding in this action, and Plaintiff's motion for partial summary judgment is denied."

In *Silberblatt & Lasher, Inc. v. United States,* 1944, 101 Sup. Ct. 54, at page 81, the Court said:

"Such a dispute (breach of contract) the Contracting Officer is not authorized to decide finally; his authority is limited to disputes arising under the contract; it does not extend to disputes over a breach of the contract."

In *Boomer v. Abbett,* 1953, 121 Cal. App. 2d 449, 263 Pac. 2d 476, the Court held that a disputes

clause was not applicable to questions arising out of a breach of contract. Citing numerous cases, the Court said, at page 462:

> "The cases interpreting federal contracts have clearly established that actions that amount to an actual breach of the contract are not covered by the 'disputes' article."
> 263 Pac. 2d 476, at page 484.

In *Continental Illinois National Bank & Trust Co. v. United States,* 101 Fed. Supp. 755, certiorari denied 343 U.S. 963 (72 Sup. Ct. 1057, 96 L. Ed. 1361), it was held that claims for unliquidated damages for breach of contract are not proper subjects of departmental adjudication. See also *Peter Kiewit Sons Co. v. United States,* 74 Fed. Supp. 165; *Blair v. United States,* 147 Fed. 2d 840, rehearing granted 150 Fed. 2d 676.

In *United States v. Utah Construction Co.,* 86 Sup. Ct. 1545, cited by the Commodity Credit Corporation, the Court stated, at page 1555, that suits on breach of contract, where the contract is terminated, are not in the Wunderlich Act standards:

> "Thus the settled construction of the disputes clause excludes breach of contract claims from its coverage whether for purposes of granting relief or for purposes of making binding findings of fact that would be reviewable under Wunderlich Act standards rather than de novo."

The various decisions relied upon by Commodity Credit Corporation involve appeals by either the Government or the contractor arising from a dispute

"under the contract" where the contract was performed and the controversy involved extra work. These cases involve a performed contract under which a dispute arose and not a contract terminated prior to completion for alleged default.

The Wunderlich Act does not change the provisions of the disputes clause in the contract. The Wunderlich Act uses substantially the same terminology as contained in the disputes clause in referring to ". . . a dispute involving a question arising under such contract. . . ."

As the cases clearly state, the purpose of the disputes clause is to resolve expeditiously disputes between the parties under a contract which has been performed. Plaintiff at no time agreed to submit the counter-claim of $159,967.07 to the Board for decision.

FINALITY DOES NOT ATTACH TO DECISIONS OF LAW MADE BY THE CONTRACT DISPUTES BOARD.

Title 41, United States Code 322, provides that no government contract shall contain a provision making final, on a question of law, the decision of an administrative official. The decision of the Contract Disputes Board is not final in all respects, and the District Court's granting of Summary Judgment in effect holds that neither a factual nor a legal issue exists. It is submitted that even under the Wunderlich Act a party is entitled to a trial on the merits, at which time the record of the administrative agency must be reviewed on all legal issues. The District

Court has limited its decision to a finding that the Board's decision is supported by substantial evidence as was not procured by fraud, but has not reviewed the legal basis for the decision itself. The application of the proper measure of damages is a question of law to be decided by this Court and as to which no decision of the Disputes Board is final.

CONCLUSION

Plaintiff's suit for breach of contract is clearly not under the Wunderlich Act because it does not involve a claim against the Commodity Credit Corporation "under the contract", but is a suit for breach of a terminated contract. Accordingly, the Appellant should be allowed a trial de novo on its action for damages, and in addition upon the counter-claim. Commodity Credit Corporation in effect has secured a $159,967.07 judgment against Fishel Products Company on a demand that was not even presented prior to the hearing before the Contract Disputes Board, and upon which the Plaintiff and Appellant did not have an opportunity to prepare for its presentation, and even when first presented was not accepted by the Hearing Officer as a basis for the litigation. Commodity Credit Corporation feels the procedure followed was an expeditious way of disposing of this claim, and while it may be a "small" amount to Commodity Credit Corporation, in view of the huge sums with which it generally deals, Petitioner should not be legally liable under the general guidelines of due

process to have judgment of $159,967.07 rendered against it by an arbitrary act of expediency on the part of the Contract Disputes Board. The failure to give Petitioner's counsel notice of the counter-claim and an opportunity to prepare for it and to have evidence produced in an open hearing, constitutes an arbitrary and capricious act and violates due process. Even if the Wunderlich Act applied, with regard to restricting the Court's ability to determine de novo factual issues, the rendering of a $159,967.07 judgment under the procedure followed by the Board is arbitrary and capricious, such as to imply bad faith.

We respectfully urge that the Writ of Certiorari be granted.

Dated, Fresno, California,
January 9, 1970.

FRANK J. CREEDE, JR.
Attorney for Appellant and
Petitioner, Fishel Products Co.

CREEDE, DAWSON & GILLASPY,
Of Counsel.

(Appendices A and B Follow)

Appendix A

United States Court of Appeals
for the Ninth Circuit

Fishel Products Company, a copartnership consisting of Edward R. Fishel and John D. Fishel, *Appellants,* vs. Commodity Credit Corporation, *Appellee.*	No. 22,752

[September 15, 1969]

Appeal from the United States District Court
for the Eastern District of California

Before: DUNIWAY and HUFSTEDLER, Circuit Judges, and PENCE,* District Judge

PER CURIAM:

Fishel Products Company ("Fishel") appeals from a summary judgment entered in favor of Commodity Credit Corporation ("CCC"), a corporation wholly owned by the United States. Fishel contracted to process into bulgur wheat owned by CCC. Bulgur is

*Hon. Martin Pence, District Judge, United States District Court, Hawaii, sitting by designation.

parched crushed wheat which is used as a dietary staple in some parts of the world.

Under one contract, dated November 28, 1962, Fishel agreed to process 5,600,000 pounds of bulgur of a specified quality and deliver it on or before January 24, 1963. Under a second contract, dated December 28, 1962, Fishel agreed to process 6,000,000 pounds and deliver it by February 25, 1963. Under both contracts, Fishel agreed to supply performance security, and its failure to do so was expressly made a material breach of the contracts entitling CCC to terminate. CCC could reject bulgur which was below the specified quality, or accept such bulgur with a provision for specified liquidated damages.

Among the "Uniform Contractual Provisions" incorporated by reference into the CCC-Fishel contracts were articles 23 and 39, providing respectively:

> "If contractor refuses or fails to perform within the time specified in the contract with respect to any shipment, or any extension of such time, Agency may, by written notice, terminate the right of Contractor to proceed with the servicing of all or any part of the commodity which has not been serviced. In addition to any damages which may be provided for in the contract for refusal or failure to perform within the time specified, Agency shall be entitled to recover the difference between the contract price and the amount which Agency may pay for having any part of the commodity serviced elsewhere, and any additional costs it may incur in connection therewith. . . .

"Except as may otherwise be provided in the contract, any dispute concerning a question of fact arising under this contract which is not disposed of by agreement shall be decided by the Contracting Officer, or designee of Agency, who shall reduce his decision to writing and mail or otherwise furnish a copy thereof to Contractor. Within 30 days from the date of receipt of such copy, Contractor may appeal by mailing or otherwise furnishing a written appeal addressed to the head of Agency, or such other persons as Agency may designate to receive such appeal and the decision of the head of Agency or his duly authorized representative for the hearings of such appeals shall be final and conclusive, unless determined by a court of competent jurisdiction to have been fraudulent, arbitrary, capricious, or so grossly erroneous as necessarily to imply bad faith or not supported by substantial evidence. . . ."

From January through March of 1963, Fishel processed 26 lots of bulgur, of which it tendered 24 to CCC. Of the lots tendered, only two met contract specifications. Five of the lots were rejected entirely. At no time did Fishel supply the required performance security.

On April 4, 1963, CCC terminated the contracts for failure to supply performance security and for failure to deliver acceptable bulgur. Fishel appealed to the Contract Disputes Board of CCC ("Board"), contending that CCC's wrongful rejection of bulgur pre-

vented it from obtaining the required performance security. A hearing was held. In a decision dated May 8, 1964, the Board ruled that CCC was legally justified in terminating Fishel's right to proceed under the two contracts. The Board granted Fishel 30 days in which to submit additional evidence with respect to the amount of damages suffered by CCC. In a decision dated November 30, 1964, the Board ruled that damages in the amount of $159,967.07 were properly assessed against Fishel. The Board specifically rejected Fishel's claim that CCC failed to mitigate damages.

Thereafter, Fishel brought the present action in the United States District Court. In its amended complaint, Fishel alleged that (1) it had performed or was excused from performing all terms and conditions of the two contracts on its part to be performed; (2) CCC wrongfully terminated the contract and refused to pay for the wheat which it had processed; (3) it had exhausted its administrative remedies; (4) it had discovered new evidence since the Board hearing to the effect that CCC had failed to mitigate damages suffered by CCC; (5) the decision of the Board was obtained by fraud and was grossly erroneous; (6) the decision of the Board was capricious and arbitrary, because CCC's counterclaim was presented for the first time on the second day of the four-day hearing before the Board, and because Fishel was not allowed to submit evidence on the counterclaim. Fishel prayed for damages in the amount of $26,630.59, the contract price for the proc-

essed bulgur, and $208,445.88 in other damages. CCC filed an answer and a counterclaim for $159,967.07, the damages found by the Board.

CCC moved for summary judgment on the grounds that the issues presented by the complaint had been decided by the Board and those issues could not be tried de novo in the District Court and that the Board's decision was supported by substantial evidence, was not arbitrary or capricious, or obtained by fraud. The District Court granted judgment for CCC in the amount of $159,967.07, and Fishel appeals.

Much of Fishel's argument on appeal is devoted to its contention that the determination of the disputes decided by the Board was outside the Board's ken under the proper application of article 39 of the contract. We do not decide the merits of Fishel's contention, because Fishel is not in a position to urge it. Fishel voluntarily submitted its dispute to the Board without reservation; it cannot now contend that the Board's unfavorable action upon Fishel's claim does not bind it.

Fishel is in no better posture on its claim that the Board improperly considered and decided CCC's counterclaim. Fishel did object to the presentation of CCC's counterclaim to the Board, but the sole grounds for its objection were that the counterclaim was untimely, that it was not given adequate notice of the counterclaim, and that it did not have an adequate opportunity to submit evidence on the damages sought in the counterclaim. Fishel did not object to the "jurisdiction" of the Board to decide the issues raised in

the counterclaim until after the Board decided the issues.

The record does not support Fishel's claim that it was deprived of a full and fair opportunity to present its defense to the counterclaim. Fishel had ample notice that CCC intended to assert a claim for damages against it under article 23 of the contract. After the Board decided that the contracts had been properly terminated, the question Fishel itself submitted, the Board gave Fishel 30 days to submit "additional evidence with respect to the amount of damages suffered by CCC including evidence on the point of whether CCC took proper action to mitigate its damages." Fishel submitted no evidence in response to the invitation. It sought no continuance and no further hearing from the Board.

United States v. Hamden Co-Operative Creamery Co. (2d Cir. 1961) 297 F.2d 130 is directly in point. Hamden contracted to sell powdered milk to CCC. A dispute arose over the quality of milk delivered. The Contract Disputes Board found that the milk did not meet the contract specifications and that Hamden owed CCC $12,386.60. The Government brought an action to collect the damages, and the District Court entered a summary judgment on the basis of the Board's assessment, rejecting Hamden's contention that the court should consider Hamden's newly discovered evidence and should make new findings of fact. The judgment was affirmed on appeal. "Inasmuch as the appellant has appeared, briefed, and argued its case before the Contract Disputes Board

without reservation . . . it is now too late for it to assert that the Board could not decide the factual issues presented in appellant's dispute with the Government. This dispute clause provided a method of arbitration by which factual disputes arising between the contracting parties were to be resolved." (297 F.2d at 133.)

We perceive no error of law in the judgment of the District Court or in the Board's determination upon which the judgment was based.

The judgment is affirmed.

Appendix B

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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

Civil No. 2632-ND

Fishel Products Company, a co-partnership consisting of Edward B. Fishel and John E. Fishel,
Plaintiffs.

vs.

Commodity Credit Corporation,
Defendant.

JUDGMENT

This action came on for hearing on defendant Commodity Credit Corporation's motion for summary judgment, on October 23, 1967, before the above-entitled Court, the Honorable Myron D. Crocker, United States District Judge, presiding. John P. Hyland, United States Attorney, by James Stotter II, Special Assistant to the United States Attorney, appeared for the defendant, and Creede & Dawson, by Frank J.

Creede, Jr., appeared for plaintiffs. Thereafter, written memoranda were filed by all the parties. The matter, having been fully heard, and reviewed, by the Court,

It is the decision of the Court that all the issues involved in this case were heard and determined by the Contracts Dispute Board, whose decision is supported by substantial evidence, and said decision was not obtained by fraud,

It is hereby ordered, adjudged and decreed that the defendant, Commodity Credit Corporation's motion for summary judgment is granted and defendant Commodity Credit Corporation is awarded judgment against the plaintiffs, Fishel Products Company, a copartnership, Edward B. Fishel, and John E. Fishel, and each of them, in the amount of one hundred and fifty-nine thousand, nine hundred sixty seven dollars and seven cents $159,967.07), with interest at the rate of 7% per annum from November 30, 1964, to the present, together with costs in the amount of $20.00.

Dated, January 24, 1968.

M. D. Crocker,
United States District Judge.

Submitted by:
John P. Hyland,
United States Attorney.
By James Stotter II,
Special Assistant to the
United States Attorney.

Filed January 24, 1968,
Clerk, U.S. District Court,
Eastern District of California.

In the Supreme Court of the United States

OCTOBER TERM, 1969

FISHEL PRODUCTS CO., PETITIONER

v.

COMMODITY CREDIT CORPORATION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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In the Supreme Court of the United States

OCTOBER TERM, 1969

No. 1060

FISHEL PRODUCTS CO., PETITIONER

v.

COMMODITY CREDIT CORPORATION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. A) is reported at 415 F. 2d 1255.

JURISDICTION

The judgment of the court of appeals was entered on September 15, 1969. The time for filing a petition for a writ of certiorari was extended to January 13, 1970, and the petition was filed on January 10, 1970. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether, under the provisions of a government contract, the Contract Disputes Board had jurisdiction to decide a counterclaim asserted by the Commodity Credit Corporation against its contractor after the contract was terminated, where the contractor did not object to the Board's assertion of jurisdiction.

2. Whether the contractor had an adequate opportunity to present evidence before the Contract Disputes Board in defense to the Commodity Credit Corporation's counterclaim.

STATUTE AND REGULATION INVOLVED

The Wunderlich Act, 41 U.S.C. 321, 322, provides:

> 321. Limitation on pleading contract-provisions relating to finality; standards of review
>
> No provision of any contract entered into by the United States, relating to the finality or conclusiveness of any decision of the head of any department or agency or his duly authorized representative or board in a dispute involving a question arising under such contract, shall be pleaded in any suit now filed or to be filed as limiting judicial review of any such decision to cases where fraud by such official or his said representative or board is alleged: *Provided, however,* That any such decision shall be final and conclusive unless the same is fraudulent or capricious or arbitrary or so grossly erroneous as necessarily to imply bad faith, or is not supported by substantial evidence.

322. Contract-provisions making decisions final on questions of law

No Government contract shall contain a provision making final on a question of law the decision of any administrative official, representation, or board.

Form CSS–50, Uniform Contractual Provisions, which conforms with the standard Disputes clause set forth at 41 C.F.R. 1–7.101–12, provides:

Article 39. Disputes.

Except as may otherwise be provided in the contract, any dispute concerning a question of fact arising under this contract which is not disposed of by agreement shall be decided by the Contracting Officer, or designee of Agency, who shall reduce his decision to writing and mail or otherwise furnish a copy thereof to Contractor. Within 30 days from the date of receipt of such copy, Contractor may appeal by mailing or otherwise furnishing a written appeal addressed to the head of Agency, or such other persons as Agency may designate to receive such appeal and the decision of the head of Agency or his duly authorized representatives for the hearings of such appeals shall be final and conclusive, unless determined by a court of competent jurisdiction to have been fraudulent, arbitrary, capricious, or so grossly erroneous as necessarily to imply bad faith or not supported by substantial evidence: *Provided,* That if no such appeal to the head of Agency is taken, the decision of the Contracting Officer shall be final and conclusive. In connection with any appeal proceeding under this clause, Contractor shall be afforded an opportunity to be heard and to offer evidence in sup-

port of its appeal. Pending final decision of a dispute hereunder, Contractor shall proceed diligently with the performance of the contract and in accordance with the Contracting Officer's decision.

STATEMENT

In the fall of 1962, petitioner entered into two contracts with the Commodity Credit Corporation ("CCC") to process government-supplied wheat into bulgur for shipment to Vietnam. On April 4, 1963, the contracting officer terminated petitioner's right to proceed under the contracts. The termination was based on the failure of most of the bulgur tendered by petitioner to meet specifications, and on petitioner's failure to furnish the required performance security.

Petitioner appealed this decision of the contracting officer to CCC's Contract Disputes Board, expressly stating that the appeal was being taken pursuant to Article 39 of CSS–50, the standard disputes clause contained in both contracts. While petitioner's claim was pending before the Board, the contracting officer determined that $176,222.61 in damages was due CCC from petitioner as a result of petitioner's failure to perform its contractual obligations.

At petitioner's request, a four-day hearing was held in Fresno, California, in November 1963, before the three-member Board, to hear evidence relating to petitioner's appeal from the decision of the contracting officer terminating the contract. Rather than waiting for petitioner to appeal formally to the Board from the contracting officer's decision finding

petitioner liable for damages, CCC also presented its documented claim for $176,222.61 to the Board on the first day of the hearing so that the entire dispute could be resolved in one proceeding (Tr. 18, 19). Counsel for petitioner initially objected on the ground of surprise (Tr. 18). After taking under advisement the question of whether petitioner's claim and CCC's counterclaim should be considered together, the Board ruled that it would hear the counterclaim (Tr. 20, 397–400). It also assured petitioner that there would be ample opportunity to meet any evidence proffered by CCC on the counterclaim (Tr. 397–400; see Tr. 20, 487, 579). Petitioner's counsel then concurred in the Board's conclusion that the claim and counterclaim should be considered together, and stated that he would present any additional evidence in the form of affidavits (Tr. 398, 399). He suggested that the Board decide first whether the contracts were wrongfully terminated, indicating that a favorable decision for petitioner on that issue would moot the question of the amount of damages due CCC on its counterclaim and would thus eliminate the need for him to present additional evidence with respect to that counterclaim (Tr. 580, 581). The Board adopted this proposal.

In a decision issued on May 8, 1964, the Board sustained the contracting officer's decision to terminate the contracts. Petitioner was given 30 days to submit additional evidence on the damage question. It failed to do so. On November 30, 1964, the Board rendered its decision on damages, allowing CCC's claim to the

extent of $159,967.07 and denying it to the extent of $16,255.54.

Petitioner then brought an action for $235,076.47 in the district court for breach of contract, and CCC counterclaimed for the amount awarded it by the Board. CCC moved for summary judgment, taking the position that the findings of the Board were reviewable only on the administrative record under the Wunderlich Act. Petitioner disagreed and sought to introduce *de novo* evidence, on the ground that the Board had no jurisdiction to entertain a dispute involving a terminated contract. CCC's motion was granted upon a finding by the district court that "all the issues involved in this case were heard and determined by the Contracts Dispute Board, whose decision is supported by substantial evidence, and said decision was not obtained by fraud" (Pet. App. ix). Judgment was entered for $159,967.07 in favor of CCC.

On petitioner's appeal, the court of appeals affirmed. The court rejected petitioner's assertion that it was entitled to a trial *de novo* in the district court, explaining that petitioner "voluntarily submitted its dispute to the Board without reservation; it cannot now contend that the Board's unfavorable action upon [its] claim does not bind it" (Pet. App. v). The court further noted that petitioner could not obtain a trial *de novo* on CCC's counterclaim since it had not objected that consideration of the counterclaim was beyond the Board's competence (Pet. App. v-vi). Thus recognizing that its review powers were limited

by the Wunderlich Act, the court concluded that the Board made no "error of law" (Pet. App. vii) and that the record did not support petitioner's claim "that it was deprived of a full and fair opportunity to present its defense to the counterclaim" (Pet. App. vi).

ARGUMENT

1. Petitioner's contention that its claim and CCC's counterclaim should have been considered by the district court *de novo* is without merit. The hearing before the Board was held at the instance of petitioner, which voluntarily submitted its dispute with CCC to the Board pursuant to the disputes clause in the contracts. Far from complaining that the Board had no authority to consider CCC's counterclaim, counsel for petitioner stated at the hearing that CCC's counterclaim "is not * * * an independent matter, but it should be considered with all of the other factors that are now before the Board" (Tr. 398).

The court below, accordingly, refused to reach the question whether the Board, in fact, was acting within its authority, stating that petitioner "is not in a position to urge" that the Board had no authority to resolve these disputes. See *United States* v. *Hamden Co-operative Creamery Co.*, 297 F. 2d 130, 133 (C.A. 2); *H. R. Henderson & Co.* v. *United States*, 169 Ct. Cl. 228, 245; cf. *Callanan Road Improvement Co.* v. *United States*, 345 U.S. 507, 513. As the court stated in *Hamden, supra*, at 133:

> Inasmuch as the appellant has appeared, briefed, and argued its case before the Contract

> Disputes Board without reservation and in compliance with Article 22 [the disputes clause], it is now too late for it to assert that the Board could not decide the factual issues presented in appellant's dispute with the Government.

This result is entirely consistent with *United States* v. *Utah Construction and Mining Co.*, 384 U.S. 394. While this Court there held that certain contract disputes were outside the jurisdiction of the Board under the disputes clause, it was not contended in that case that the contractor had agreed to submit these disputes to the Board. Since the "jurisdiction" of the Board is a matter of agreement between the parties to the contract rather than of power in the judicial sense, the Board does have authority to determine questions of fact submitted to it with the consent of both contracting parties. See *E. I. du Pont de Nemours & Co.* v. *Lyles & Lang Construction Co.*, 219 F. 2d 328, 334 (C.A. 4), certiorari denied, 349 U.S. 956; cf. *Jefferson Construction Co.* v. *United States*, 392 F. 2d 1006, 1011 (Ct. Cl.), certiorari denied, 393 U.S. 842; *Commerce International Co.* v. *United States*, 338 F. 2d 81, 85 (Ct. Cl.); *National Presto Industries, Inc.* v. *United States*, 338 F. 2d 99, 103 n. 2. (Ct. Cl.), certiorari denied, 380 U.S. 962.

2. Petitioner urges that it was denied an opportunity to present before the Board oral testimony that

CCC wrongfully failed to mitigate damages. As the court below correctly found, the record does not support this assertion. Counsel for petitioner specifically rested his case, "subject to permission to meet the Government's case on damages by proper affidavit as heretofore stipulated" (Tr. 579). He never indicated that petitioner's evidence could not adequately be presented by means of affidavit. He never requested another hearing; in fact, he stated that it would be an "unconscionable expense" to reconvene the hearing (Tr. 399). Between the final day of the hearing, November 22, 1963, and the day the record was closed, thirty days after the decision of May 8, 1964—a period of approximately six months—petitioner submitted no evidence and did not request any additional opportunity to present evidence either orally or by affidavit.

3. Petitioner also points out that under the Wunderlich Act the Board can make no final decisions on legal questions. 41 U.S.C. 322. Recognizing this rule, the court of appeals examined the record and expressly ruled that "[w]e perceive no error of law in the judgment of the District Court or in the Board's determination upon which the judgment was based" (Pet. App. vii). Thus, the courts below properly fulfilled their function of judicial review—and petitioner does not point to any legal question which it claims was erroneously decided.

CONCLUSION

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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